No. 95-1649

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

STATE OF KANSAS,
Petitioner,
v.
LEROY HENDRICKS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Kansas

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

FURTHER REASONS FOR GRANTING THE WRIT

The Brief in Opposition ("Opp.") adopts verbatim the Petition's statement of the questions presented, and acknowledges that the Kansas Sexually Violent Predator Act "presents important constitutional issues," Opp. 9. There is no dispute that the decision below by the Kansas Supreme Court rested solely and squarely on substantive due process grounds which are clearly presented for this Court's review. Thirty-three other states and two territories agree with the State of Kansas that this Court's guidance is urgently needed on the constitutionality of

the Kansas Act and similar statutes already enacted or under consideration. And this Court has already decided to stay the mandate of the Kansas Supreme Court pending action on the Petition and any plenary review that may follow.[1] Under these circumstances, the Brief in Opposition offers no legitimate justification for this Court to decline review.

I. THERE IS NO REASON TO DELAY REVIEW OF ISSUES THAT HAVE BEEN THOROUGHLY EXAMINED BY THREE STATE SUPREME COURTS AND ONE FEDERAL DISTRICT COURT, WITH CONFLICTING RESULTS WHICH NUMEROUS STATES REQUEST THIS COURT TO RESOLVE.

Including the State of Kansas, the petitioner in this case, no less than thirty-four states and two territories have indicated to this Court that they require immediate guidance on the issues presented in the Petition in order to evaluate their options for dealing with sexually violent predators in a constitutional fashion. *See* Brief of the States of Washington *et al.* as Amici Curiae (filed May 13, 1996).

In spite of this demonstrated necessity for the immediate resolution of these complex and important constitutional issues, Respondent maintains that this Court should deny review in this case for three reasons: (1) the existing sexual predator statutes are "recent enactments," Opp. 9; (2) the statutes may raise other issues such as ex post facto and double jeopardy concerns that the Kansas Petition does not raise, *id.* 10-11; and (3) the Kansas Legislature recently amended the Kansas civil commitment law in a way that may permit its use for the treatment of sexual predators in future cases, *id.* 12. Each of these contentions merits only brief discussion.

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[1] Order of April 22, 1996 (A-843).

First, although the six existing sexual predator statutes are relatively recent enactments, the Petition in this case amply demonstrates that the courts that have addressed such statutes already have split clearly and deeply on their constitutionality. At this time, the Washington Supreme Court and the Wisconsin Supreme Court have upheld their statutes against substantive due process challenges, *see In re Young*, 122 Wash. 2d 1, 857 P.2d 989 (1993); *State v. Post*, 197 Wis. 2d 279, 541 N.W. 2d 115 (1995), *cert. pending*, No. 95-8204, while the Kansas Supreme Court in this case and one federal district court, *see Young v. Weston*, 898 F. Supp. 744 (W.D. Wash. 1995, *appeal pending*, No. 95-35958 (9th Cir.) (argued Mar. 7, 1996), have declared the Kansas and Washington statutes unconstitutional. Given the extreme public importance of the questions presented, and the compelling interests at stake on both sides of these issues, this sharp split of authority warrants the Court's immediate attention. The States have strongly indicated that they would like to know whether they constitutionally may adopt and implement sexual predator statutes. Presumably, those individuals who have been or may be committed under these statutes also would prefer that the constitutionality of these statutes be determined sooner rather than later.

Second, although it is true that the Kansas Supreme Court invalidated the Kansas Act solely on substantive due process grounds and the Petition therefore only raises that issue, this state of affairs should, if anything, counsel in favor of granting certiorari here. That issue is thoroughly discussed in the Kansas Supreme Court's majority and dissenting opinions, and the Court thus may limit its focus to substantive due process, which by itself raises substantial and complex questions. Petitioner is unaware of any rule or practice of this Court to grant certiorari in cases involving constitutional challenges to a state statute only if every possible federal constitutional

ground has been addressed by the state supreme court and presented in the petition for a writ of certiorari.[2]

Third, Respondent's reference to a recent amendment to the Kansas civil commitment law is a red herring. The bill at issue (Senate Bill No. 706, enacted in April 1996) specifically provides that it shall not take effect unless and until the Kansas Supreme Court's mandate in this case issues. This Court's order of April 22, 1996, stays that mandate "pending this Court's action on the petition for a writ of certiorari" and further provides that "should the petition for a writ of certiorari be granted, this order is to continue in effect pending the issuance of the mandate of this Court."[3] Senate Bill No. 706 provides that in any event the amendment to the civil commitment law will expire automatically on June 30, 1977; any re-enactment of such a provision could not occur prior to the legislature's 1997 legislative session, which begins next January. It is clear from these provisions that the Kansas Legislature strongly prefers the Kansas Sexually Violent Predator Act at issue in this case to any other approach to the sexual predator problem. The amendment merely provides state officials with some fall-back authority to commit sexually violent predators for long term care and treatment in the event this

[2] Nonetheless, in the event the Court wishes also to address the other constitutional objections that have been raised to the Kansas Act and similar statutes, it can do so by granting Respondent's Conditional Cross-Petition, which would raise ex post facto, double jeopardy and equal protection issues. The State of Kansas is filing a Memorandum stating that it stands ready to brief and argue those issues and does not oppose the granting of the Cross-Petition in the event that is what the Court decides to do. The State would request, however, that in that event the two cases be briefed and argued separately in order to permit adequate brief space to address these issues and ample argument time to respond to the Court's concerns.

[3] Petitioner's Application to Stay Mandate, which the April 22 order granted, advised this Court of the enactment of Senate Bill No. 706.

Court denies certiorari or holds in this case that the Act is unconstitutional. Because Senate Bill No. 706 will have no legal or practical effect so long as this case is pending in this Court or if this Court holds the Act constitutional, it should in no way interfere with this Court's plenary review of this case and the more broadly applicable issues it presents.

II. ONLY THIS COURT IS IN A POSITION TO DECIDE WHETHER THE KANSAS SUPREME COURT AND OTHER LOWER COURTS HAVE CORRECTLY APPLIED THE COURT'S DECISION IN *FOUCHA v. LOUISIANA*, 504 U.S. 71 (1992)

Respondent contends that there is no question but that *Foucha* requires the application of strict scrutiny in the situation presented here. Opp. 13-15. As demonstrated beyond dispute in the Petition, however, several members of this Court in the *Foucha* case questioned what standard should be applied, *see* 504 U.S. at 115-16 (Thomas, J., dissenting, joined by Rehnquist, C.J., and Scalia, J.), and the majority never declared the standard it was applying. The same situation occurred in the Kansas Supreme Court in this case. *See* Pet. App. 33a, 36a (Larson, J., dissenting, joined by two other justices). Thus, Respondent's suggestion that the State has somehow waived the standard of review—when the Kansas Supreme Court majority failed to articulate the standard it was applying and the dissent pointedly observed that the standard was not clear—is not only unsupportable on the record presented but, if accepted, would create the bizarre result that this Court would be compelled to apply strict scrutiny to the Kansas Act even if a majority determined that strict scrutiny was not the correct standard.

Respondent's argument that the Kansas Supreme Court correctly applied *Foucha* to invalidate the Act, Opp. 15-19, is more properly addressed in a brief on the merits than in an opposition to a petition for a writ of cer-

tiorari. Respondent does not, and indeed cannot, dispute that the lower courts have divided sharply in their application of *Foucha* to sexual predator statutes. Based on the requirements for obtaining the stay that this Court ordered in this case on April 22, 1996, it appears that at least five members of the Court are of the view that there are at least plausible arguments that the Kansas Supreme Court incorrectly interpreted *Foucha*. Moreover, at least thirty-four states and two territories urge that the rules after *Foucha* are unclear and require further resolution by this Court.

CONCLUSION

For the reasons set forth in this Reply and in the Petition for a Writ of Certiorari, the State of Kansas respectfully requests that the Court grant plenary review of both questions presented in the Petition.

Respectfully submitted,

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